

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK
NOV 18 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| THE STATE OF ARIZONA, |) | |
| |) | |
| Respondent, |) | 2 CA-CR 2009-0238-PR |
| |) | DEPARTMENT A |
| v. |) | <u>MEMORANDUM DECISION</u> |
| |) | Not for Publication |
| CHRIS WERNER, |) | Rule 111, Rules of |
| |) | the Supreme Court |
| Petitioner. |) | |
| _____ |) | |

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S110CR200500428

Honorable Boyd T. Johnson, Judge

REVIEW GRANTED; RELIEF DENIED

Chris Werner

Florence
In Propria Persona

ESPINOSA, Presiding Judge.

¶1 Pursuant to a plea agreement, petitioner Chris Werner was convicted in October 2005 of attempted sexual conduct with a minor and attempted molestation, dangerous crimes against children. The trial court imposed an aggravated term of fifteen

years' imprisonment for attempted sexual conduct, to be followed by a consecutive, suspended sentence and lifetime probation for attempted child molestation.

¶2 Werner seeks review of the trial court's order denying relief on his second petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. Werner had commenced his first Rule 32 proceeding by filing a notice of post-conviction relief in April 2006.¹ Counsel was appointed and, after she had reviewed the record and transcripts, had notified the court that she found no colorable claims that would entitle Werner to Rule 32 relief. *See* Ariz. R. Crim. P. 32.4(c)(2). The court granted counsel's request that Werner be given a forty-five day extension to file a petition in propria persona, if he chose to do so. *See id.*

¶3 Werner did not file a pro se petition by the deadline imposed by the court, and the court dismissed the Rule 32 proceeding and granted counsel's request to withdraw. Werner did not seek review of that decision.

¶4 After the Rule 32 petition was dismissed, Werner sought appointment of new counsel. The trial court never ruled on his request, possibly because no proceeding was pending at the time. Nearly nineteen months later, without filing a new notice of post-conviction relief, Werner filed a pro se petition claiming former A.R.S. § 13-604.01 was unconstitutionally vague in its application to crimes of attempted dangerous crimes against

¹Although that notice was untimely, *see* Ariz. R. Crim. P. 32.4(a), Werner alleged his failure to file timely was not his fault, but caused by his attorney's failure to send him the required form. *See* Ariz. R. Crim. P. 32.1(f), 32.2(b).

children and the court therefore lacked subject matter jurisdiction to sentence him pursuant to that statute.² Alternatively, he argued trial counsel was ineffective for failing to challenge application of the statute during plea proceedings.

¶5 The trial court regarded Werner's petition as a successive Rule 32 proceeding and appointed new counsel, granting him leave to supplement Werner's petition. But, like counsel in Werner's first Rule 32 proceeding, the attorney appointed for this proceeding informed the court that, after reviewing the record, he could find no colorable claims for Rule 32 relief and would not be filing a supplemental petition.³ After reviewing Werner's pro se petition and the record, the court denied post-conviction relief, finding Werner had failed to raise a colorable claim.

¶6 We will not disturb a trial court's denial of post-conviction relief unless the court has abused its discretion. *State v. Mata*, 185 Ariz. 319, 331, 916 P.2d 1035, 1047 (1996). In his petition for review, Werner contends the court abused its discretion in denying relief and in doing so without an evidentiary hearing. Essentially, he contends the

²For consistency with court documents, we cite § 13-604.01, which was the number of the statute in effect when Werner committed his offenses. *See* 2001 Ariz. Sess. Laws, ch. 334, § 7. The provisions of former § 13-604.01 have been recodified in A.R.S. § 13-705 and are materially unchanged for the purpose of this review. 2008 Ariz. Sess. Laws, ch. 301, §§ 17, 29; *see generally* 2008 Ariz. Sess. Laws, ch. 301, § 119.

³The court granted Werner an additional sixty-day extension to supplement his pro se petition, but no supplement was filed.

court committed legal error in failing to find § 13-604.01 was unconstitutionally applied in his case.⁴ We find no abuse of discretion in the court’s summary denial of relief.

¶7 We agree with the trial court that Werner’s claim alleged legal error based solely on the court’s construction of § 13-604.01, and an evidentiary hearing would therefore serve no purpose. We also agree that Werner’s claim was without merit. Although § 13-604.01 does not use the term “attempt” in defining offenses, it clearly provides that “preparatory offenses” involving sexual conduct with a child and molestation are to be considered dangerous crimes against children in the second degree, § 13-604.01(L), and punished according to the provisions of § 13-604.01(I). And, as Werner tacitly acknowledges, preparatory offenses include crimes of attempt. *See* A.R.S. title 13, chapter 10 (generally governing classification of preparatory offenses including attempt, A.R.S. § 13-1001; solicitation, A.R.S. § 13-1002; conspiracy, A.R.S. § 13-1003; and facilitation, A.R.S. § 13-1004; *see also* § 13-604.01(J) (providing penalties for preparatory offenses involving dangerous crimes against children “notwithstanding” provisions of title 13, chapter 10); *State v. Peek*, 219 Ariz. 182, ¶¶ 7, 19, 195 P.3d 641, 642, 644 (2008) (reference in § 13-604.01 to second-degree (preparatory) dangerous crimes against children is “clear language subjecting attempt offenses” to its provisions).

⁴Werner does not raise his alternate theory of ineffective assistance of counsel in his petition for review and, accordingly, we do not address it. *See* Rule 32.9(c)(1) (“Failure to raise any issue that could be raised in the petition . . . for review shall constitute waiver of appellate review of that issue.”).

¶8 In addition, contrary to Werner’s argument in the trial court, his claim of sentencing error in this successive petition clearly is precluded. *See State v. Shrum*, 220 Ariz. 115, ¶¶ 3-6, 23, 203 P.3d 1175, 1176-77, 1180 (2009) (absent exception found in Rule 32.2(b), defendant precluded from raising sentencing error in second Rule 32 proceeding after of-right proceeding dismissed).

¶9 For the foregoing reasons, we grant the petition for review, but we deny relief.

PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

JOSEPH W. HOWARD, Chief Judge

J. WILLIAM BRAMMER, JR., Judge